

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JARED L. COPE, et al.,
Plaintiff,

v.

WINCO FOODS, LLC,,
Defendant.

No. CV-07-5064-FVS

ORDER DENYING
RECONSIDERATION

THIS MATTER comes before the Court based upon the plaintiff's motion for reconsideration. He is represented by Janet E. Taylor. The defendant is represented Francis L. Van Dusen and Jerilynn C. Gonzales.

BACKGROUND

Jared Cope was employed by WinCo Foods, LLC, as the manager of one of its meat departments. He was a member of WinCo Foods #45 Department Manager Hourly Employee Association. As a union member, his employment relationship with WinCo was governed by a collective bargaining agreement ("CBA"). During July of 2007, WinCo fired Mr. Cope for allegedly using racial slurs and tolerating his subordinates' use of ethnic slurs. He invoked the CBA's grievance procedure. The first step was a hearing before the Department Head Committee (hereinafter "Committee"). On July 31, 2007, the Committee directed Winco to reinstate him with back pay, benefits, and seniority. Mr. Cope alleges that, during August, a representative of WinCo told him that the

1 company was not going to reinstate him as the manager of a meat
2 department; that he would have to work in some lesser position. Mr.
3 Cope alleges that he advised the WinCo representative that he was
4 unwilling to accept the terms the company was offering. This led to an
5 impasse of sorts. Eventually, WinCo construed Mr. Cope's refusal to
6 accept any position other than meat department manager as a decision to
7 quit working for the company. Mr. Cope and his wife filed an action
8 against WinCo. They have pled at least three, and perhaps four, causes
9 of action: Mr. Cope alleges that WinCo breached the CBA by failing to
10 reinstate him, and that WinCo discharged him in retaliation for filing
11 a grievance.¹ Mrs. Cope alleges that WinCo deprived her of loss of
12 consortium.

13 On May 9, 2008, WinCo moved to dismiss the breach-of-contract
14 claim on the ground that Mr. Cope has a duty under the CBA to submit
15 this issue to arbitration. (Defendant's Motion to Dismiss, at 4-5.²)
16 Mr. Cope disagreed; arguing that, since neither he nor WinCo sought
17 arbitration of the Committee's decision, its decision was final,
18 binding, and subject to enforcement in federal court. (Plaintiff's
19 Memorandum in Opposition, at 6.³) The Court construed Mr. Cope's
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21 ¹It is clear that Mr. Cope is alleging retaliatory discharge
22 in violation of state public policy. (Plaintiffs' Memorandum of
23 Authorities in Opposition to Defendant's Motion to Dismiss (Ct.
24 Rec. 52), at 14-15.) Less clear is whether he is alleging
25 retaliatory discharge in violation of the National Labor Relations
26 Act.

²(Ct. Rec. 13.)

³(Ct. Rec. 15.)

1 argument as an allegation that WinCo had waived its right to
2 arbitration by failing to request arbitration. Ordinarily, an
3 allegation of "waiver" is a "procedural" issue that an arbitrator must
4 decide rather than a "gateway" issues that a district court must
5 decide. Accordingly, on June 11, 2008, the Court dismissed Mr. Cope's
6 breach-of-contract claim without prejudice pending a determination by
7 an arbitrator with respect to whether the substance of the claim is
8 subject to arbitration.

9 Mr. Cope moves the Court to reconsider. He argues that
10 reconsideration is warranted for the following reasons: To begin with,
11 it is unfair to give WinCo a second opportunity to seek arbitration.
12 Furthermore, only this Court has jurisdiction to enforce the
13 Committee's decision. Finally, under the terms of the CBA, an
14 arbitrator lacks authority to determine whether arbitration is
15 available at this stage in the proceedings, and WinCo has repudiated
16 the grievance process.

17 **STANDARD**

18 In order to qualify for reconsideration, Mr. Cope must either
19 present newly discovered evidence, or demonstrate that the Court
20 clearly committed an error of law, or establish that controlling law
21 has changed. *See Sch. Dist. No. 1J, Multnomah Cty. Or. v. ACandS,*
22 *Inc.*, 5 F.3d 1255, 1262 (9th Cir.1993).

23 **RULING**

24 Each one of the arguments that Mr. Cope makes in support of his
25 motion for reconsideration may turn out to be correct; but the
26 correctness or incorrectness of his arguments is not the issue. The

1 issue is whether he must first present them to an arbitrator. In its
2 earlier order, the Court explained:

3 A judge must resolve "gateway" disputes concerning
4 arbitrability. *Howsam v. Dean Witter Reynolds, Inc.*, 537
5 U.S. 79, 83-4, 123 S.Ct. 588, 592, 154 L.Ed.2d 491 (2002).
6 Examples include "whether the parties have a valid
7 arbitration agreement at all[,]" and "whether a concededly
8 binding arbitration clause applies to a certain type of
9 controversy." *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444,
10 452, 123 S.Ct. 2402, 2407, 156 L.Ed.2d 414 (2003). By
11 contrast, "procedural" disputes are for an arbitrator to
decide. *Howsam*, 537 U.S. at 84, 123 S.Ct. at 592.
Procedural disputes include "'allegation[s] of waiver, delay,
or a like defense to arbitrability." *Id.* (quoting *Moses H.
Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1,
24-25, 103 S.Ct. 927, 941, 74 L.Ed.2d 765 (1983)).

12 (Order Dismissing Breach-Of-Contract Claim, at 2.⁴) Were Mr. Cope
13 denying the existence of an agreement to arbitrate, or were he denying
14 that Winco had a right to arbitrate the dispute that gives rise to his
15 breach-of-contract claim, the Court might be faced with a gateway
16 issue. But that is not the case. Mr. Cope acknowledges that the CBA
17 contains an arbitration clause and that WinCo could have arbitrated the
18 Committee's decision had the company made a timely request. Instead,
19 he argues that he is entitled to proceed in district court with his
20 breach-of-contract claim because Winco did not demand arbitration until
21 after he filed this action. An argument of the sort that Mr. Cope is
22 making -- i.e., waiver -- is a quintessentially procedural argument.
23 See *Howsam*, 537 U.S. at 84, 123 S.Ct. at 592. The fact that Mr. Cope
24 couches his objection to arbitration in terms of "jurisdiction" and
25 "authority" does not alter its substance. The Court correctly

26 ⁴(Ct. Rec. 26.)

1 determined that Mr. Cope's objection is procedural in nature.
2 Consequently, the Court did not err, much less clearly err, in
3 requiring him to present it to an arbitrator before the Court considers
4 it.

5 **IT IS HEREBY ORDERED:**

6 The plaintiff's motion for reconsideration (**Ct. Rec. 32**) is
7 denied.

8 **IT IS SO ORDERED.** The District Court Executive is hereby directed
9 to enter this order and furnish copies to counsel.

10 **DATED** this 29th day of August, 2008.

11
12 s/ Fred Van Sickle
Fred Van Sickle
13 Senior United States District Judge
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